

TITLE 327 WATER POLLUTION CONTROL BOARD

#99-111 (WPCB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from October 1, 1999, through November 1, 1999, on IDEM's draft rule language. IDEM received comments from the following parties:

Timothy W. Lohner, American Electric Power (AEP)

Stanley W. Sorrels, BP Amoco Oil (BPA)

Rick Wajda, Indiana Builders Association (IBA)

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Following is a summary of the comments received and IDEM's responses thereto.

Comment: Clarification is needed to emphasize that increases or decreases in thermal loadings, that are allowed under Section 316(a) of the Clean Water Act, are exempt from applicability under the antidegradation rule because federal regulations prohibit a state's antidegradation policies to take precedence over Section 316(a) of the Clean Water Act, regardless of the classification of the water body. The following language is suggested to clarify this issue:

ASection 11.7(c)(3)(A)(iv)**Exclusive of changes provided for under a 316(a) variance,** the new or increased discharge will not result in both of the following:

(a) an increase in temperature..@ (AEP)

Response: IDEM agrees with the comment and is proposing to include the following language in 327 IAC 5-2-11.7(d): Notwithstanding subsection (c)(4)(B) and (C), and in accordance with the antidegradation standard in 327 IAC 2-1.5-4(e), in those cases where the potential lowering of water quality is associated with a thermal discharge, the decision to allow such degradation shall be consistent with Section 316 of the Clean Water Act and 327 IAC 5-7.

Comment: As this interim rule has been applied on a case-by-case basis, uncertainties in interpretation have arisen. The rule should clearly specify conditions under which antidegradation review should apply for new or increased loadings. Our position is that changes in loadings which can be accommodated within existing effluent permit limitations should not trigger antidegradation review. (BPA)

Response: IDEM agrees with the comment and is proposing to include in 327 IAC 5-2-11.7(a)(1) and (a)(2) the following: **“For which a new or increased permit limit would be required.”** By adding this phrase, the rule is clear when antidegradation review is required.

Comment: Due to its status as a temporary rule, especially one in which procedural uncertainties remain, the interim rule should not be adopted without the insertion of an expiration date. The current draft rule language does not show an expiration date. We suggest an expiration date of two years after adoption. (BPA, IMA)

Response: IDEM agrees with the comment and recommends that an expiration date of July 1, 2002, be included in this section.

Comment: The existing rule contains a specific exemption for discharges of storm water subject to a general permit under 327 IAC 15-5 (Rule 5). This exemption is wise considering that Rule 5 has had seven years of success in controlling sediment on construction sites. The draft rule language eliminates this exemption, requiring developers of construction sites to be subjected to additional public notice requirements and to prove necessity, which is quite repetitive and unnecessary. The current exemption for discharges under Rule 5 should be sustained during this current rulemaking. (IBA)

Response: In the Great Lakes rule that became effective March 1, 1997, 327 IAC 15-2-6 was revised to require that a discharger that was eligible for a general permit under Article 15 that discharged into an OSRW would not be eligible for the general permit, but would instead be required to seek an individual NPDES permit. Because of this, the provision concerning Rule 5 has been deleted from 11.7.

Comment: The rule needs to be clearer and consistent as to the basis on which IDEM will determine that there is a new or increased discharge subject to the rule. The term **“new or increased discharge”** should be replaced throughout the rule with the term **“new or increased mass loading”**. Also, the words **“loading”** and **“loadings”** should be preceded by **“mass”** wherever they appear. (IMA)

Response: IDEM does not recommend, at this time, to make this change.

Comment: The concept of a **“new or increased mass loading”** needs to be defined and clarified. The rule was intended to apply only to situations where IDEM is issuing a new or increased permit limit. Our suggested definitions are as follows:

“New mass loading” means the discharge of mass loadings of one or more pollutants from a point source that had not received an NPDES permit from IDEM prior to the effective date of this rule, or the discharge from a point source of mass loadings of one or more pollutants that have not been discharged by that source before the effective date of this rule.

AIncreased mass loading@ means a change in mass loading from a point source that would exceed an effluent limitation specified in a current NPDES permit limit, or a change in mass loading from a point source that would require imposition of water quality-based effluent limitations for one or more pollutants that are not subject to effluent limitations in the current permit. For bioaccumulative chemicals of concern (BCCs)**A**increased mass loading@ shall also include any other increase in loading of the BCC due to deliberate action by a point source.

In both cases, the definitions need to be read in conjunction with the exceptions that are already specified in 327 IAC 11.7(b) and (c). Read together, the definitions and exceptions would ensure that the rule is appropriately focused on changes in permit limits, except where a more stringent approach is required by the federal Great Lakes Initiative (i.e., in the case of BCCs). (IMA)

Response: IDEM does not recommend revising this section at this time. Further discussion is necessary

Comment: The permit conditions that are applied to OSRW dischargers need to be clarified. Specifically, 327 IAC 5-2-11.7(a)(3)(A) was intended to ensure that a regulated facility cannot take an action that results in a new or increased loading that is subject to the rule (i.e., it is above existing perm limits) without following the requirements that are set forth in the rule. Our concern is that the rule is phrased in a fashion that could be interpreted to reach beyond its original intent, by implying that dischargers can take no action to increase their discharges beyond current levels. That would be inconsistent with the rest of the rule, which clearly allows certain increases to take place. To avoid that inconsistent and confusing result, IDEM should revise 327 IAC 5-2-11.7(a)(3)(A) to read as follows:

AThe permit shall prohibit the regulated facility from undertaking any new or increased mass loading that is subject to this rule, unless and until the applicable requirement of this section have been satisfied@ (IMA)

Response: IDEM agrees with this comment and has added the following language to the end of 11.7(a)(3)(A), **AY**, unless the action complies with applicable provisions of this section of the rule@.

Comment: The introductory language of 327 IAC 5-2-11.7(c) needs to be clarified, to ensure that the exceptions in that provision operate as intended. Recently, it appears that some confusion has arisen as to whether this subdivision is somehow intended to be an independent requirement that applies even if an action is not subject to subsection (a)(1) or (a)(2). That is clearly not the case. The requirements in subsection (a)(1) and (a)(2) were intended to be gateways to the rule; in an action is not subject to either of those requirements, then the rule does not apply, and there is no need to review the exceptions in subsection (b) or (c). To ensure that there is no confusion about this point, we recommend that the introductory language in subsection (c) be revised to read as follows:

AThe commissioner may specify that subsections (a)(1) and (a)(2) do not apply to an action listed in subdivision (1) or (2), after providing public notice and opportunity for comment in accordance with subdivision (5)@

Response: IDEM agrees with this comment and has revised 11.7(c).

Comment: The provisions related to temperature need to be revised to recognize the role of section 316(a) variances. Federal antidegradation requirements provide that if a point source has made the requisite demonstration to obtain a 316(a) variance, that demonstration is deemed to satisfy applicable antidegradation requirements. The interim rule does not specifically address this issue. We recommend that the rule be revised to be consistent with the federal antidegradation policy, so that activities covered by a 316(a) variance are not subjected to unnecessary and duplicative requirements under the interim rule. (IMA)

Response: IDEM agrees with the comment and is proposing to include the following language in 327 IAC 5-2-11.7(d): Notwithstanding subsection (c)(4)(B) and (C), and in accordance with the antidegradation standard in 327 IAC 2-1.5-4(e), in those cases where the potential lowering of water quality is associated with a thermal discharge, the decision to allow such degradation shall be consistent with Section 316 of the Clean Water Act and 327 IAC 5-7.